90-742

SUPREME COURT OF THE UNITED STATES

NO._____

JOSE A. SOTO

CERTIORARI

Appellant, Petitioner

V.

UNITED STATES POSTAL SERVICE

Appellee, Respondent

PETITION FOR CERTIORARI

JOSE A. SOTO, PRO SE
12 Street No. 728
Barrio Obrero
Santurce, Puerto Rico 00915
Phone: (809) 726-8523

SUPREME COURT OF THE UNITED STATES

NO._____

JOSE A. SOTO

Appellant, Petitioner

CERTIORARI

Vs.

UNITED STATES POSTAL SERVICE

Appellee, Respondent

PETITION FOR CERTIORARI

TO THE HONORABLE COURT:

Petitioner, pro se, ASKS that a certiorari be issued in order to review and revoke the decision of the United States Court of Appeals for the First Circuit to be mentioned for the following:

QUESTIONS PRESENTED FOR REVIEW

1.- "The notice of right to file a civil action" letter, not informing who is the proper party to be brought, deprives plaintiff of judicial redress converting right in nothing to the advantage of the government.

2. Plaintiff had the right to amend his complaint since he filed on time and there is an identity of interest between the Postmaster General and the United States Postal Service.

3. To say that service had to be accomplished within the same thirty-day limitations period to file action is an "absurdum" since they are governed by different provisions of law.

4. Circumstances of present case deserve legal and equitable tolling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

PAGE

CASES (FEDERAL)

OPINIONS DELIVERED IN THE CASE

1.- Judgment of the United States Court of Appeals, no. 89-2123, José A. Soto, plaintiff, appellant v. United States Postal Service, defendant, appellee, appeal from the United States District Court for the District of Puerto Rico, Judge, Rosenn, Circuit Judge dated June 6, 1990, which affirms the dismissal of complaint in the District Court by plaintiff a veteran and postal employee for nine years under section 7703(b)(2) of Title 5 and Title VII, 42 U.S.C. section 2000 e-16(c), impermissible discharge for drug dependency in violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 791, right of accomodation.

2.- Judgment of the District Court, Civ. 87-00930 (GG) dated November 2, 1989 and order dated October 31, 1989 dismissing action predicated upon the fact that plaintiff did not bring in time the adequate party, Postmaster General, neither service of process was brought about within the time limitation period of one

hundred twenty (120) days barring him from amendment of complaint and relief. This decision is contrary to law and justice which merits reversal for which present recourse stands.

3. Final decision of the United States Equal Employment Opportunity Commission - June 12th, 1987.

4. Initial decision of the United States of America Merit Systems Protection Board - December 15, 1986.

JURISDICTION OF THE COURT

This Court has jurisdiction under 28 U.S.C. 1254 and Rule 10 of the Court.

STATEMENT OF THE CASE

Petitioner was dismissed by respondent, affirmed by the Merit Systems Protection Board. Appeal to the Equal Employment Opportunity Commission, affirmed also. Civil action under the provisions stated, supra page 2, concerning violation of civil rights and the Rehabil-

itation Act-right of accomodation-was brought. Petitioner was not granted his right of accomodation and dismissal was a harsh measure concerning his fault.

He proceeded in forma pauperis without legal aid which deserve him the right to prosecute his case on the merits. His service of process was effected, around thirty (30) days after the time limit provisions of Rule 4 of Federal Civil Procedure causing no prejudice to respondent.

This Honorable Court should impose an obligation to the federal agencies to inform correctly "who" you have to sue and to "when" and to "whom" equitable tolling should be granted. There is no unanimity of opinion between the Circuits as to in what circumstances amendment of a complaint should be granted specially if a federal agency is involved, rather than a private litigant.

ARGUMENT

If failure to provide the name or official title of the agency head or, the department head, may result in the loss of any judicial redress why then, the letter does not clearly express who in ultimate instance is the proper party? Don't you think that common federal employees in view of due process of law deserve that right? Don't you think that the term "over all national organization" may lead even experienced trial lawyers to interpret such words as leading to say United States Postal Service? That is a mere interpretation of a wording by the federal judicial system. It is clear from the start plaintiff's intention to file the corresponding suit. Rys v U.S. Postal Service, 886 F2d at 445 and Lamb v United States Postal Service, 852 F.2d 845, 846, 847 (5th Cir. 1988) should be revoked. They do not represent justice in a fair view of what the letter and judicial review represents.

You are saying that failure to provide the name of the apropriate defendant "WILL" result in loss of judicial redress. And that is not what the letter expresses.

It is clear that plaintiff only had thirty(30) days from receiving the letter to file civil action, but in filing in due time, which he did, had the right to amend his complaint.

The decision of the Court of Appeals, page 4 paragraph 2 refers as "extraordinary volley of motions" for dismissal from appellees. Naturally. Who can compare a well trained lawyer to a civilian layman neither accustomed to judicial matters.

II

Filing is filing and service is service. There is a time limit to file and there is a time limit for service of process. If you file on time the law grants you time for service and if you do not bring a proper

party, the law grants you the opportunity to bring other interested parties provided certain requirements are met. Might be a foolish or Kindergarden argument but to say that appellant had only thirty days to service process does not seem sound argument. Rule 15 (c) of Civil Procedure does not require service of process within the time limitations period to file action. The government received formal notice upon the service of process, effectuated thirty days after limitations period of 120 days by a man proceeding pro se and in forma pauperis. If you have thirty days to file, you have not to provide explanation for filing in the last same day. There is no delay.

FOR ALL STATED, petitioner PRAYS that judgment of the Court of Appeals be revoked ordering remand for trial with any other pronouncement of law applicable.

San Juan, Puerto Rico this 30 of October, 1990.

José A. Soto
JOSE A. SOTO
12 Street No. 728
Barrio Obrero
Santurce, Puerto Rico 00915
Phone: (809) 726-8523

Copy to:

Solicitor General Kenneth W. Starr

SUPREME COURT OF THE UNITED STATES

NO._____

JOSE A. SOTO

CERTIORARI

Appellant, Petitioner

Vs.

UNITED STATES POSTAL SERVICE

Appellee, Respondent

A P P E N D I X

PAGE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

NO. 89-2123

JOSE A. SOTO

Plaintiff, Appellant

v.

UNITED STATES POSTAL SERVICE

Defendant, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Gilberto Gierbolini, U.S. District Judge]

Before

Selya, Circuit Judge,

Rosenn,* Senior Circuit Judge,

and Cyr, Circuit Judge.

Luis Angel Lopez Olmedo on brief for appellant.

Joan C. Goodrich, Office of Labor Law, United States Postal Service, Daniel F. Lopez-Romo, United States Attorney, Fidel A. Sevillano Del Rio, Assistant United States Attorney, and Jesse L. Butler, Assistant General Counsel, on brief for appellee.

JUNE 6, 1990

---

*Of the Third Circuit, sitting by designation.

ROSENN, Circuit Judge. José A. Soto, a former postal worker, brought a discrimination claim under 29 U.S.C. & 791, against the United States Postal Service (Postal Service) claiming that it had wrongfully discharged him because of what he euphemistically describes as a handicap, drug addiction. The United States District Court for the District of Puerto Rico, upon motion by the Postal Service, granted summary judgment on statute of limitations grounds. It ruled that Soto had filed the complaint against an improper defendant and that it should have been filed against the Postmaster General. Because the statute of limitations barred any amendment, it refused to allow the addition of the Postmaster General as a defendant.[1] Soto appeals. Based

---

1. The trial court exercised jurisdiction pursuant to 5 U.S.C. & 7702. This court has jurisdiction pursuant to 28 U.S.C. & 1291.

upon this court's most recent decision in Rys v. United States Postal Service, 886 F.2d 443 (1st. Cir. 1989), we affirm the district court's dismissal of Soto's action.

I.

The Postal Service terminated Soto from his position as distribution clerk in the San Juan, Puerto Rico, Post Office. After a review, which found Soto often had been absent from work without permission and failed to meet the requirements of his position, it officially dismissed him. Soto appealed his dismissal to the Merit Systems Protection Board (MSPB), alleging that his discharge was impermissibly based upon his drug dependency in violation of the Rehabilitation Act of 1973 (29 U.S.C. & 791). The MSPB Administrative Law Judge (ALJ) affirmed the Postal Service's decision, and the MSPB by final order and decision denied Soto's petition for review. Soto then appealed to the Equal Employment Opportunity Commission(EEOC), which concurred with the MSPB, the ALJ, and the Postal Service.

Upon reaching its decision the EEOC sent Soto a "Notice of Right to File a Civil Action," informing him of his right to bring a civil action. The notice advised Soto of his right to file a civil action in the appropriate United States District Court and specifically warned that failure to provide the name or official title of the agency head may result in the loss of judicial redress. In relevant part it stated:

> You are further notified that if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25 (d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, not the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

(Emphasis, both upper case and underlines, in original). Soto received this letter on June 18, 1987.

On Friday, July 17, 1987, thirty days after he received the letter, Soto filed a motion to proceed in forma pauperis, and a pro se complaint in the form of a letter with the United States District Court of Puerto Rico. In the caption and body of the letter-complaint, Soto revealed his intention to "file a civil action against the U.S. Postal Service for firing me from my work." The court granted Soto's in forma pauperis motion and the complaint was officially filed on July 22, 1987. The summons, however, named the "U.S. Postal Service" as the defendant, and process was not served until December 15, 1987. A private process server's return showed service upon the "U.S. Postal Service" in San Juan, Puerto Rico, and a United States Marshal returned a similar service on the United States Attorney in

San Juan on December 21, 1987. It is unknown why the summonses were not issued until December 15.

In an extraordinary volley of motions, the Postal Service moved for dismissal on several grounds, primarily alleging that the plaintiff did not sue a proper party and that the statute of limitations had run. On April 29, 1988, plaintiff sought and obtained an extension of time to answer so that he might obtain legal counsel. Soto's counsel filed a motion on May 2, 1989, to amend the complaint to add the Postmaster General as a defendant. The complaint was referred to a magistrate, who recommended that the Postal Service's motion to dismiss be granted. The magistrate found the Postmaster General was the only proper defedant, and that Schiavone v. Fortune, 477 U.S. 21 (1986), barred Soto's attempt to amend. The magistrate found no circumstances to justify equitably tolling the statute of limitations. The district

court adopted the magistrate's findings and dismissed the action. Soto appealed to this court, claiming that legal and equitable principles require that he be permitted to amend the complaint and have his day in court.

II.

Section 7703(b)(2) of Title 5 requires that employment discrimination cases of this nature be brought under Title VII, which requires that all claims be brought against the "head of the department, agency, or unit, as appropriate." 42 U.S.C. & 2000 e-16(c). In cases brought against the Postal Service, the Postmaster General is the only properly named defendant. Rys v. U.S. Postal Service, 885 F. 2d at 445. A district court should dismiss claims brought against all other defendants, including the U.S. Postal Service and the local postmaster. Lamb v. United States Postal Service, 852 F.2d 845, 846-47 (5th Cir. 1988). Soto brought his claim against only

the United States Postal Service. Only if Soto were to amend the complaint by adding the Postmaster General would the claim be cognizable. Soto's proposed amendment, however, is barred by the statute of limitations.

A federal employee, such as Soto, has only thirty days from receiving his right-to-sue letter from the EEOC to file a civil action. 42 U.S.C. & 2000 e-16(c); see Rys, supra. Soto's thirty days ran on July 17, 1987, the date on which he filed his initial complaint. The proposed amendment does not relate back to same thirty-day limitations period, as required under Fed. R. Civ. P. 15(c). See Schiavone, supra; Rys, supra.

Although the Supreme Court has announced that "the spirit and inclination of the rules favored decision on the merits," Schiavone, 477 U.S. at 27, and that decisions on the merits are not to be avoided on the basis of technicalities, it also has concluded that the plain meaning of the Rule may not be tempered merely by the

elements of hardship and sympathy. See id. at 30. The Supreme Court has strictly construed Rule 15(c) to allow amendments to add a party only when:

> (1) the basic claim [arose] out of the conduct set forth in the original pleading; (2) the party to be brought in [has] received such notice that it will not be prejudiced . . . . . ' (3) that party must or should have known that, but for the mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone, 477 U.S. at 29. Specifically, this requires that the party to be added receive formal notice of the claim before the statute of limitations runs; it does not allow amendment if service, though timely under the Federal Rules, see Fed. R. Civ. P. 4, was not effectuated prior to the running of the statute of limitations for the filing of the claim. Id. at 30.

The facts of Schiavone make it apparent that even if the originally named party is virtually an alter ego

of the party to be added by amendment and would not be prejudiced by the late amendment, amendment will not be allowed if the proper defendant was not served within the limitations period. In Schiavone, the plaintiff sued Fortune magazine, which was not an independent entity, but a publication of Time, Inc. The Court held that because Time was not effectively served within the limitations period, though it was served within the time allowed under Fed. R. Civ. P. 4, amendment to make Time a defendant was not permissible. Thus, it is unavailing here that the Postmaster General is intimately connected with the Postal Service and, in fact, is being sued in his capacity as head of the Postal Service.

Although it is undisputed that the allegations in the complaint as amended are unaltered except for the correct name of the defendant, and that the Postmaster General would not be prejudiced by the amendment, it

is also undeniable that service was not accomplished until after the thirty-day statute of limitations period had run. Soto did not initially file his complaint until the final day before the statute of limitations ran, July 17, 1987. Thus, his claim was doomed from the outset, because only virtually instantaneous service would have preserved his ability to later amend to add the proper party. Service, in fact, was far from instantaneous; service of process was not achieved until December 15, 1987. Under Schiavone's rigid ruling, the district court correctly denied Soto's motion to amend, unless we determine that the statute of limitations should have been equitably tolled, See Rys, supra; Williams v Army and Air Force Exchange Service, 830 F.2d 27, 29-30 (3d Cir. 1987). We perceive no circumstances in this case to mandate such tolling of the statute of limitations.

This court, despite never formally deciding that

the equitable tolling of claims against the federal government is permissible, Rys, 886 F.2d at 445-46, "hew[s] to a 'narrow view' of equitable exceptions to Title VII limitations periods." Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 185 (1st Cir. 1989). The Supreme Court has also limited the availability of equitable modifications to Title VII statute of limitations to cases in which:

> a claimant has received inadequate notice, or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, or where the court has led the plaintiff to believe that she had done everything required of her . . . [or] where affirmative misconduct on the party of a defendant lulled the plaintiff into inaction.

Baldwin County Welcome Center v Brown, 446 U.S. 147, 151 (1984) (citations omitted). A showing of a mere lack of prejudice to the defendant is not enough to justify tolling the statute; there must also be an affirmative showing that one of the named equities existed. Id. at 151-52.

In the instant case, Soto's primary contention is that the right-to-sue letter was confusing, and led him to believe that the U.S. Postal Service was a proper defendant. We reviewed a nearly identical right-to-sue letter in Rys and rejected equitable tolling based upon the letter's alleged ambiguity. We held that it was apparent from the letter read in context " . . . that a plaintiff must name the head of an agency or department . . ." Rys 886 F.2d at 447 (citations omitted). We find no facts, nor has Soto directed us to any, in the instant case which distinguish it from Rys. Thus, we are compelled to hold that the alleged lack of clarity in EEOC's letter did not require the district court to equitably toll the thirty-day statute of limitations.

As we noted in Rys, it is no excuse, legally, that Soto was proceeding pro se. Id. at 448. Soto "has failed to name the appropriate defendant in his complaint, and he has not proven such active deception by the government and diligence by himself that would justify

the invocation of an equitable exception to remedy his mistake." Id. The court denied Soto the ability to amend his complaint and dismissed his complaint because he failed to file it until the last day of the limitations period. He has provided no explanation for this delay. Thus, we consider it irrelevant, in determining whether the statute of limitations should have been equitably tolled, that he was delayed by an inability to retain counsel after the claim was filed and that process did not issue in a timely manner. Even assuming that he had not encountered these delays, his motion to amend, absent the virtual impossibility of instantaneous service, still would have been barred under the Federal Rules.

III.

In sum, the district court correctly ruled that Soto did not file his complaint against the proper party and that Schiavone bars any amendment to add the Postmaster General. Additionally, there are no facts

involved which would justify equitable tolling of the statute of limitations.

Accordingly, the judgment of the district court is AFFIRMED in all respects.

Adm. Office, U.S. Courts-Blanchard Press, Inc.,Boston,Mass.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

JOSE A. SOTO *

Plaintiff *

vs *

Civ. 87-00930 GG

U.S. POSTAL SERVICE *

Defendant *

*

J U D G M E N T

The Court having entered an order through Hon. Gilberto Gierbolini, approving and adopting as our own the magistrate's report and recommendation, it is WHEREFORE

ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby DISMISSED.

SO ORDERED.

San Juan, Puerto Rico, this 2nd day of November, 1989.

JUAN M. MASINI-SOLER
Clerk of the Court

By: (SIGNED)
Deputy Clerk

s/cs: AUSA, Sevillano
L. Lopez
OB

16

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE A. SOTO		
Plaintiff		
v.		CIVIL NO. 87-0930 GG
U.S. POSTAL SERVICE		
Defendant		

O R D E R

Defendant, a former postal employee, filed the present action pro se against the United States Postal Service seeking review of an administrative decision which upheld his dismissal from employment. In synthesis, defendant claimed that the U.S. Postal Service violated his rights by dismissing him without taking into account and accommodating his handicap, drug dependency, as required by the Rehabilitation Act of 1973, 29 U.S.C. & 701 et seq.

Plaintiff received the decision and accompanying notice of the Office of Review and Appeals (ORA) of the

Equal Employment Opportunity Commission on June 18, 1987 and filed the instant complaint on July 22, 1987, i.e., thirty-four days later. Defendant filed a motion to dismiss alleging that plaintiff had failed to file his civil action within the thirty-day period provided by 5 U.S.C. & 7703(b)(2) and that he had also failed to serve the Postmaster General, the U.S. Attorney, the Attorney General of the United States, or any other federal official with summons or complaint within the statutory limitations period. Plaintiff, through his legal representative, filed an opposition.

This matter was referred to the magistrate and on September 27, 1989 he rendered a report recommending that defendant's motion to dismiss be granted. Essentially, he was of the opinion that the circumstances of this case — that plaintiff initially proceeded pro se -- did not justify the application of equitable modification doctrine to toll the thirty-day limit in which to file a civil action.

Although plaintiff attempted to amend his complaint to name the correct party, the Postmaster General, under the relation-back provision of Federal Rule of Civil Procedure 15(c), plaintiff failed to give actual notice to the proper party within the thirty-day period. Relying heavily on Schiavone v Fortune, 477 U.S. 21(1986), the magistrate noted that in order for relation-back under Federal Rule of Civil Procedure 15(c) to apply, the defendant must receive actual notice such as service of process, within the applicable limitations period. Since plaintiff failed to do so, dismissal was also recommended on this ground. Although Federal Rule of Civil Procedure 4(j) allows an additional 120 days to effect service on the proper defendant once a complaint has been filed, Schiavone held that his 120-day period was not available unless a plaintiff could demonstrate that he or she properly notified the defendant within the statutory limitations period. In the present case, although the complaint was filed within the limitations

period, service was not attemped until well after this period had expired, i.e., on December 21, 1987, almost five months later.

Wherefore, in view of the above, the Magistrate's Report and Recommendation is hereby approved and defendant's motion to dismiss is GRANTED. The Clerk shall enter judgment dismissing the present action.

SO ORDERED.

San Juan, Puerto Rico, this 31st day of Oct. , 1989.

(SIGNED)
GILBERTO GIERBOLINI
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

JOSE A. SOTO Plaintiff	*	
v.	*	Civil No. 87-0930 (GG)
U.S. POSTAL SERVICE Defendant	*	

MAGISTRATE'S REPORT AND RECOMMENDATION
TO THE HON. GILBERTO GIERBOLINI

The plaintiff, Jose A. Soto, was a distribution clerk at the main Post Office in San Juan, Puerto Rico. On July 14, 1986, the Postal Service issued plaintiff a Notice of Proposed Removal charging him with unauthorized absences, absences without official leave, failure to meet the requirements of the position, and failure to obey written orders. On August 1, 1986, the Postal Service issued its Letter of Decision-Removal, informing plaintiff of his removal effective August 15, 1986.

The plaintiff appealed the Postal Service's decision to the New York Regional Office of the Merit System Protection Board (hereinafter MSPB) claiming,

inter alia, that the Postal Service had failed to accommodate his handicap, drug dependency. In a decision dated December 15, 1986, Administrative Judge Otis Packwood affirmed the agency's decision. On January 8, 1987, the plaintiff petitioned the MSPB to review the Administrative Judge's decision, and in a decision dated March 17, 1987, the MSPB denied plaintiff's request for review.

On April 7, 1987, plaintiff initiated a petition for review with the Office of Review and Appeals of the Employment Opportunity Commission (ORA of the EEOC). The issue presented to the ORA for review was whether the Postal Service had an obligation to further accomdate petitioner's handicap of drug abuse. In a decision dated June 12, 1987, the ORA concurred with the final decision of the MSPB.

Attached to the ORA's decision was a Notice of Right to File a Civil Action, which stated as follows:

> "... you have the right to file a civil action in the appropriate United States District Court, based on the decision of the Merit Systems Protec-

> tion Board, WITHIN THIRTY (30) DAYS of the date that you receive the Commission's decision... You are further notified that if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT."

Plaintiff received the ORA's decision and accompanying notice on June 18, 1987. Defendant filed a Motion to Dismiss (Docket 5), alleging that (1) the plaintiff commenced this civil action approximately 34 days later when he filed his complaint with this Court on July 22, 1987, and (2) that plaintiff failed to serve the U.S. Attorney, the Attorney General of the United States, and the Postmaster General of the United States, or any other federal official with a Summons or Compalint within 120 days of the date of filing.

The plaintiff asks for equitable modification. In a case interpreting the doctrine of equitable modification, the Supreme Court outline circumstances that might justify equitable tolling. Baldwin County Welcome Center v Brown, 446 U.S. 147, 151-52 (1984), reh. denied, 467 U.S. 1231 (1984). These circumstances include situations

where (1) a claimant has received inadequate notice, or (2) where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, or (3) where the court has led the plaintiff to believe that plaintiff had done everything required, or (4) where the affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. Baldwin County Welcome Center, supra, at 151-52. This Magistrate does not find that any of these circumstances exist in the present case. A litigant "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." In James v U.S. Postal Service, 835 F.2d 1265, 1267 (8th Cir. 1988), the Court upheld a district court's dismissal of plaintiff's employment discrimination complaint stating that even if the requirements for commencing an action in district court were subject to equitable tolling, the fact that plaintiff was pro se did not justify equitable modification.

In Schiavone v. Fortune, 477 U.S. 21 (1986), the Supreme Court addressed this issue. The plaintiffs in Schiavone instituted a libel action naming Fortune Magazine as defendant instead of the proper party, Time, Inc. ("Time"). Id. at 22-3. Although the complaints as originally drawn were filed within the limitations period, service was not attempted until this period had expired. Id. at 25. The Supreme Court upheld the Court of Appeal's dismissal of plaintiff's complaint. Id. at 32. The Schiavone Court stated that the amendment to the complaint naming the proper defendant did not relate back to the filing of the original complaint pursuant to Rule 15(c) because Time did not receive notice "within the period by law for commencing an action". At p. 30. In Stewart v U.S. Postal Service, 649 F.Supp. 1531, 1534 (S.D. N.Y. 1986), the plaintiff, a pro se litigant, sought review in district court of an EEOC determination upholding the Postal Service's denial of a promotion.

The plaintiff named the Postal Service as the sole defendant in his complaint, not the Postmaster General, the proper party. Although the plaintiff filed his original complaint within the thirty (30) day limitation period, he did not serve within it. The Stewart court concluded that since the Postal Service and the Postmaster General did not receive notice of the action within the thirty (30) day limitation period, 4 Schiavone did not allow a substitution of the Postmaster General for the Postal Service to relate back to the original complaint. The court concluded that "the effect of Schiavone is that a pro se plaintiff must both file and serve within the statute of limitations to protect his claim from a dismissal on a technical ground such as this." Id., at 1536.

Wherefore, this Magistrate recommends that defendant's Motion to Dismiss be granted.

Any objections to this Report and Recommendation

must be filed with the Clerk of this Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); Borden v. HHS, 836 F.2d 4, 6 (1st Cir. 1987).

IT IS SO RECOMMENDED.

San Juan, Puerto Rico, on this 26th day of September, 1989.

(SIGNED)
ROBERTO SCHMIDT-MONGE
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE A. SOTO

Plaintiff

Vs. - CIVIL NO. 87-0930(GG)

UNITED STATES POSTAL SERVICE

Defendant

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

TO THE HONORABLE COURT:

Plaintiff through the undersigned files his objections to the Magistrate's Report and Recommendations for the dismissal of the action in present case as follows:

1. Recommendation is based upon the doctrine of Schiavone ans Stewart, 1986 cases.

2. The Schiavone and Stewart doctrine is no longer law to the effect since it was revoked by Williams v Army and Air Force Exchange Service, 830, F. 2d 27, 30 (3d Cir. 1987); Mondy v Secretary of the Army, 845 F.2d

1051, 1052 n.2 (D.C. Cir. 1988) (discussing 42 U.S.C. S 2000 e-16(c) citing Paulk v Department of the Air Force, 830 F.2d 79, 80 (7th Cir. 1987); See Edinboro v Department of Health and Human Services, Civ. No. 87-2795 (S.D.N.Y. Dec. 20, (1988).

3. As of to the requirement fo the 120 day limitation period to serve, we refer to the history of the case as expressed in our Opposition to Reply dated October 27, 1988, that is, pro se complaint motion to proceed i forma pauperis, steps to obtain legal representation and issaunce of the summons on December 15, 1987, duly served on that same date and the 19th.

If summons were issued on that date, how could plaintiff serve defendant within 120 days after filing the action?

WHEREFORE to the Honorable Court plaintiff prays that Magistrate's Report and Recommendation be set aside and proceedings be continued.

San Juan, Puerto Rico, this 6th day of October, 1989.

(SIGNED)
LUIS ANGEL LOPEZ OLMEDO
609 Condado Avenue
Suite 204
Santurce, Puerto Rico 00907
Ph. (809) 722-5564

Copy to: Fidel A. Sevillano del Río, Assistant U.S. Attorney, Federal Building, Room 101, Carlos E. Chardón Avenue, Hato Rey, Puerto Rico 00918.